(3)

No. 95-853

In The

Supreme Court of the United States

October Term, 1995

M.L.B.,

Petitioner,

vs.

S.L.J., INDIVIDUALLY, AND AS NEXT FRIEND OF THE MINOR CHILDREN, S.L.J. AND M.L.J., AND HIS WIFE, J.P.J.,

Respondents.

On Petition For Writ Of Certiorari
To The Supreme Court Of Mississippi

PETITIONER'S REPLY MEMORANDUM

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PETITIONER'S REPLY MEMORANDUM

Nowhere does the Respondent's brief address the Petitioner's claim that certiorari should be granted because this case implicates *a fundamental right* -- specifically, the right of a parent in her relationship with her child. Instead, the Respondent bases its contention that certiorari should be refused upon case law which, for the most part, deals with the denial of in forma pauperis appeals in situations where no fundamental rights are at stake.

This reply memorandum first will address the importance of the federal constitutional issue involved in this case, and second will discuss the conflict among the courts.

THE IMPORTANCE OF THE FEDERAL CONSTITUTIONAL ISSUE

As noted in the Petition, the issue raised in this case is an important one that has yet to be decided by this Court, and the decision of the Mississippi Supreme Court conflicts with the reasoning of this Court's holdings in *Griffin v. Illinois*, 351 U.S. 12 (1956), and *Boddie v. Connecticut*, 401 U.S. 371 (1971). The Respondent claims, however, that the Mississippi Supreme Court's decision "is in conformity with this Court's decision in *Ortwein v. Schwab*, 410 U.S. 656 (1973)," Respondent's Brief at 2, and that *Ortwein* specifically stated that *Boddie* "was not concerned with post-hearing review." *Id.*, quoting 410 U.S. at 659. While it is true that *Boddie* involved a trial court proceeding and *Ortwein* an appeal, this Court specifically based its decision in *Ortwein* on the fact that the interest in that case -- seeking increased welfare payments -- had what this Court called "far less constitutional significance than the interest of the *Boddie* appellants." *Ortwein*, 410 U.S. at 659. *Boddie* dealt with the dissolution of a marriage, which is of a similar magnitude, in terms of constitutional significance, as the dissolution of parental rights

that occurred in the present case. This distinguishes both *Boddie* and the present case from *Ortwein*. Moreover, the fee required in *Ortwein* was only twenty-five dollars, while the Mississippi Supreme Court in the present case required the advance payment of over two thousand dollars. None of these crucial points are addressed by the Respondent.

As for *Griffin*, the Respondent contends that *Griffin* and its progeny "are not relevant since they deal only with criminal cases." Resp. Br. at 3. This fails to recognize that this Court specifically has discussed *Griffin* in the context of civil cases, stating in *Boddie* that "the rationale of *Griffin* covers this case." 401 U.S. at 382. *See also, Lindsey v. Normet*, 405 U.S. 56, 77 (1972) (citing *Griffin* in the course of striking down a procedural requirement that unconstitutionally burdened the availablity of appeals for some civil litigants). Indeed, the present case falls within the intersection of the principles in *Griffin*, which involved an appeal in a criminal case, and those in *Boddie*, which involved a trial court proceeding relating to a fundamental right in a civil case, and that is one of the reasons this Court should grant certiorari to review this case.

Also, with respect to *Griffin* and its progeny, nowhere does the Respondent address the very important point that, for many parents, the termination of parental rights by a state court is a much more grievous harm that what could be imposed by a state court in a misdemeanor criminal case, *see*, *Mayer v. Chicago*, 404 U.S. 189 (1971) (indigent defendant has a right to provision of a transcript for appeal in a case where he was faced with a $500 fine, and no imprisonment, for two misdemeanor offenses), or even in a felony case.

In this connection, the Respondent states that there were no allegations in the present case upon which criminal charges could be lodged against the Petitioner. Accordingly,

says the Respondent:

> [T]he statement by the Court in *Lassiter v. Department of Social Services*, 452 U.S. 18 (1991), that appointed counsel may be required in a termination of parental rights case if there are allegations upon which criminal charges could be based is not applicable to this case.

Resp. Br. at 4. Of course, *Lassiter* held that a number of factors should be considered in determining whether appointment of counsel is constitutionally required in any given parental termination case, and only one of them -- mentioned in passing by the Court -- is whether the case included allegations of criminal activity. 452 U.S. at 27 n.3, 31. But even in *Lassiter*, in which the parental termination proceeding also involved no allegations of criminal conduct toward the child, *id.* at 32, the Court held that the Constitution requires at least an individual evaluation of whether the appointment of counsel was required *in that particular case*. The Mississippi Supreme Court's practice, refusing across-the-board to permit in forma pauperis civil appeals, does not allow even that much, although this Court's decisions establish that the right of access to existing appellate avenues is much broader than the right to counsel. *See*, Petition for Certiorari at 16, and the cases cited therein.

The Respondent attempts to denigrate the importance of the present case by contending that even if the Petitioner were constitutionally entitled to appeal despite her indigency, it is unlikely she would prevail on any such appeal to the Mississippi Supreme Court. Resp. Br. at 6-7 and n. 6. Of course, that is beside the point. The question here is whether the Petitioner has the constitutional right to appeal the termination of her parental rights just as a wealthier person can, even though the Petitioner cannot pay over $2,000 in advance of the appeal.

Moreover, to the extent the Petitioner's prospects in appealing the termination are relevant, it is clear the Petitioner has a serious possibility of prevailing. As noted in the Petition, appellate review in Mississippi, for those who can afford it, is an integral part of assuring that no parent's rights are terminated without meeting the federal constitutional and state statutory requirement of clear and convincing evidence of unfitness. Pet. Cert. at 13-14. Contrary to the implication of the Respondent, Resp. Br. at 6-7 and n. 6, the Mississippi Supreme Court has said it will not hesitate to reverse a termination of parental rights if the evidentiary standard has not been met. Pet. Cert. at 13-14.

Indeed, from 1980 to the present, there are sixteen reported Mississippi Supreme Court cases citing the termination statute, Miss. Code § 93-15-103. (Only about a year ago did Mississippi begin utilizing an intermediate Court of Appeals, but appeals still lie to the Supreme Court, which determines whether to keep the cases or send them to the Court of Appeals. See Rules 16-17, Miss. Rules of App. Procedure.) Twelve of those sixteen cases involved Supreme Court affirmance or reversal, on the merits, of the grant or denial of termination. Eight of those twelve reviewed trial court termination orders and the other four reviewed trial court denials of termination. Of the eight termination orders reviewed by the Court, three were reversed for a failure to meet the evidentiary standard, *Petit v. Holifield*, 443 So.2d 874 (Miss. 1984); *De La Oliva v. Lowndes County Dept. of Public Welfare*, 423 So.2d 1328 (Miss. 1982); *In Re Adoption of a Female Child*, 412 So.2d 1175 (Miss. 1982), while five were affirmed. *Natural Mother v. Paternal Aunt*, 583 So.2d 614 (Miss. 1991); *Vance v. Lincoln County Dept. of Public Welfare*, 582 So.2d 414 (Miss. 1991); *Carson v. Natchez Children's Home*, 580 So.2d 1248 (Miss. 1991); *G.M.R., Sr. v. H.E.S.*, 489 So.2d 498 (Miss. 1986); *Doe v. Attorney W.*, 410 So.2d 1312 (Miss. 1982).

Thus, any suggestion that appellate review is unimportant or unavailing in these cases is simply wrong. Given the availability of appellate review to parents who are not indigent and the fundamental nature of the interest at stake, the present case raises a very important issue of constitutional law.

THE CONFLICT AMONG THE COURTS

The Respondent does not dispute the fact that the decisions of at least five state supreme courts are at odds with the holding of the Mississippi Supreme Court in the present case, see Pet. Cert. at 20-21. Instead, the Respondent contends that these other decisions "are aberrations based on the predeliction of the individual justices rather than well reasoned opinions." Resp. Br. at 5, n. 5. That is a rather reckless and unsupportable statement. But more importantly, whether those other cases are the result of individual "predelictions" or serious constitutional analysis, they create a conflict that is appropriate for this Court's review and resolution on certiorari. See Rule 10(b) of the Rules of this Court.

Moreover, the Respondent is simply wrong to suggest that those five decisions are "aberrations," Resp. Br. at 5, n. 5, and that "the vast majority of state courts," id. at 5, agree with the Mississippi Supreme Court. The Respondent cites only two cases to support its claim about "the vast majority of state courts." In one of those two cases, *In Re Marriage of Valleroy*, 548 S.W.2d 857 (Mo. 1977), the appellant had obtained the relief she sought in the trial court in the sense that her marriage was dissolved, although she was not satisfied with all of the terms. While the Court held that due process did not require a waiver of the appellate fees and costs for her to appeal the details of the terms of the dissolution, this came in a context where she nevertheless

could afford to appeal inasmuch as she did appeal, and inasmuch as the appellate court reviewed her claim on the merits. In the other case, *Rich v. Lang*, 604 P.2d 1248 (Okla. 1979), the indigent parent was permitted to appeal, in forma pauperis and on the merits, the denial of his termination of parental rights without paying the cost deposit, even though the Court held that a transcript was unnecessary and that he was not entitled to a transcript in the context of that case. That is a far cry from the present case, where the Mississippi Supreme Court will not even consider the possibility of an in forma pauperis appeal and will not consider waiving the cost deposit -- irrespective of any questions about the necessity of a transcript.

As for the federal courts of appeals cases cited by the Respondent, Resp. Br. at 2, 4, none of them involved fundamental rights of the type at issue here. *See, e.g.*, *Nickens v. Melton*, 38 F.3d 183, 185 n. 5 (5th Cir. 1994) ("we note that the interest here at stake . . . is not as fundamental as, for example, marriage or liberty"). With respect to *Lecates v. Justice of the Peace Court No. 4*, 637 F.2d 898 (3rd Cir. 1980), the Respondent is correct that it hinged in part on the right to obtain a jury trial with a law-trained judge as part of the appeal de novo from a Justice of the Peace court to a court of record. Resp. Br. at 4-5. In that sense, it is different from the present case. But *Lecates* is relevant, and in conflict with the present case, inasmuch as it suggests that if a state creates court procedures that are available to litigants dissatisfied with the initial court proceeding in a civil case, access to the subsequent proceedings may not hinge on a litigant's wealth without violating the federal constitution. 637 F.2d at 909.

CONCLUSION

For the foregoing reasons, as well as those set out in the Petition, the writ of certiorari should be granted.

Respectfully Submitted,

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